IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 79 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAMESH NATHABHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 79 of 1999

MR BN KESHWANI for appellant No. 1
MS SADHANA SAGAR for appellant No. 2
MR. N.D. GOHIL, APP, for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE K.M.MEHTA

Date of decision: 27/11/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE K.M.MEHTA)

1. The original accused nos. 1 and 2 of Special (NDPS) Case No. 16 of 1997 have filed this appeal under section 374 of the Criminal Procedure Code challenging the judgment and order of conviction and sentence dated 31.12.1998 by the learned Special Judge and Additional Sessions Judge, Kheda at Nadiad convicting both the appellants for offences punishable under section 8 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, 'the said Act') and sentencing each of the appellants to suffer R.I. for ten years and to pay a fine of Rs. 1 lac, in default, to undergo further R.I. for six months.

2. The brief facts of the prosecution case are as under:

On 4.9.1995,the complainant Police Inspector S.K.Chauhan of Narcotic Cell, CID Ahmedabad, left out on a casual patrolling duty in a jeep alongwith his colleagues and subordinate police officers. When they reached near village Ratanpur of Kheda District and when they were taking snacks at Rangila Park, Chamunda Restaurant, Police Inspector Chauhan received information from informant that the appellants were selling brown sugar near Mohammad Faiyaz Auto Garage at Radhvanaj Chokdi Cross Roads. The complainant was also given the names and description of both the appellants by the informant. The complainant accordingly contacted his superior officers, namely Superintendent of Police, Narcotic Cell, Ahmedabad by phone and conveyed the information received by him. Thereafter, panchas were called and the raiding party along with panchas went to the spot and they saw both the appellants accused present there. Both the accused were cornered by the raiding party and they were jointly informed about the identity of the complainant and both the accused appellants were given an option to be searched in presence of some gazetted officer or Magistrate, but both of them declined. Both the appellants also declined to take search of the person of the raiding party. On search of the person of appellant No. 1 Ramesh, 150 gms. of brown sugar was recovered and on search of the person of accused No.2, 100 grams of brown sugar was recovered. Preliminary test was carried out and thereafter two samples were drawn from each of the plastic bags of brown sugar found from the possession of the appellants

accused. All the samples and the main packets of brown sugar were sealed with the slip bearing signatures of the panchas. Thereafter houses of both the appellants were also searched in presence of panchas but nothing was found from the house of appellant accused No. 2. However, 400 grams of brown sugar was found from the house of appellant accused No. 1. Samples were drawn and both the samples and the main plastic bag containing 400 grams of brown sugar were sealed and necessary panchnama was also prepared.

3. It is further the prosecution case that the complainant, Mr.Chauhan, Police Inspector, went to Matar Police Station and lodged his complaint and he formally produced muddamal articles before the Police Station Officer, Matar Police Station who took the muddamal articles with him. The Matar Police Station registered the offence punishable under Section 8 read with Sections 21 and 29 of the said Act. The complainant thereafter started investigation from Matar Police Station.

4. According to the prosecution, three muddamal sample packets were forwarded to the Forensic Science Laboratory, Ahmedabad, on 5.9.1997 and thereafter the investigation was handed over to P.S.I. Mr.Jhala who was subordinate officer of the complainant Mr. Chauhan, Police Inspector. Both the appellants were arrested on the very date of search and they were taken on police remand and on completion of police investigation and on receipt of the report from the Forensic Science Laboratory, Ahmedabad, Matar Police Station submitted chargesheet against both the appellants accused for offences punishable under Section 8(c) read with Section 21 and 29 of the said Act.

5. The learned Additional Sessions Judge, Kheda District at Nadiad framed charge at Ex.4 against the appellants. The appellants pleaded not guilty and claimed to be tried. After appreciating the evidence on record, the learned Trial Judge, as observed earlier, passed an order of conviction and sentence as stated above. Hence this appeal.

6. Learned advocate Mr.Keshwani for the appellants submitted that the complainant who carried out search did not inform both the appellants about their right flowing from section 50 of the Act and, therefore, the trial stands vitiated. According Mr. Keshwani, the appellants were denied right of their person to be searched in presence of either Gazetted Officer or Magistrate. He cited case law to substantiate his submissions to which

we will make a reference hereafter.

7. The prosecution, to bring home the charge against the accused, has examined Police Inspector Mr.H.K.Chauhan at Ex.15, Police Constable Shakaraji Somaji Ex.31, Head Constable Harjitsinh Ex.35, SRP Constable Jaisinh Ex. 37, Police Constable Prakash Jadav Ex.39, PSI BB Jhala Ex.40, RB Bhatt Ex.46 and BG Shah at Ex.55. Two panchas Muzafarkhan Pirkhan Ex.9 and Prabhatsinh Kantibhai Ex.14 who were examined have not supported the prosecution and were declared hostile.

8. We have narrated the entire prosecution case in detail while narrating the facts and, therefore, it is not necessary for us to re-narrate evidence of the complainant and other members of the raiding party. Needles to mention that they have given identical versions in their evidence.

9. Mr.HK Chauhan, PW 3 Ex.15, who is the complainant, after cornering the accused and after giving his introduction to the accused, has stated in his evidence that both the accused were informed that search was required to be carried out of their person and if they desired presence of Gazetted Officer or Magistrate, necessary arrangement shall be made. According to him, the accused were informed orally as well as in writing. Even in the complaint Ex. 17 as well as panchanama Ex. 10, except informing the appellants as to whether the search was to be carried out in presence of Gazetted Officer or a Magistrate, nothing further was stated that it was the right of the accused to decide whether the search was to be carried out in presence of a Gazetted Officer or a Magistrate.

10. PW 5 Harjitsinh, Head Constable and PW 7 Prakash Jadhav who had accompanied the complainant as members of raiding party, have also given identical versions like the complainant, in their evidence. They have also not informed both the appellants that it was their right to be searched in presence of Gazetted Officer or a Magistrate.

11. The Constitution Bench of the Apex Court, in the case of State of Punjab Vs. Baldevsingh, 2000(1) GLH 1 (AIR 1999 SC 2378) has held that it was the obligation of an Empowered Officer and his duty before conducting search of the person of a suspect, on the basis of prior information, to inform the suspect that he had the right to require his search being conducted in presence of a Gazetted Officer or a Magistrate and that the failure to

so inform the suspect of his right would render the search illegal because the suspect would not be able to avail the protection which is in-built under section 50. Failure on the part of the Empowered Officer to do so would also render the search illegal and conviction and sentence of the accused bad.

12. The same view is reiterated in the case of Vinod Vs. State of Maharashtra, 2003 SCC (Cr.) 14 wherein the Apex Court has observed that police officer concerned must inform the accused of his right to be searched before Executive Magistrate or a Gazetted Officer. In absence of any evidence showing the same, there was non compliance with mandatory requirements of section 50. The Supreme Court also held that search of the person of the accused having, thus, not been established, his possession of brown sugar also cannot be said to have been proved.

13. In the case of K.Mohanan Vs. State of Kerala, (2000) 10 SCC 222, the Apex Court held that before conducting search, the police officer concerned cannot merely ask the accused whether he would like to be produced before the Executive Magistrate or a Gazetted Officer for the purpose of search, but inform him of his right in that behalf under the law.

14. In Laleshwar Rajak Kalanand Dhobi Vs. State of Gujarat, (2002) 7 SCC 704, the Apex Court again held that it is obligatory for the prosecution to inform the accused of his right to be searched by a Gazetted Officer or an Executive Magistrate in compliance with the mandatory requirement of section 50 and failure to do the same would vitiate the trial.

15. Learned APP Mr. Gohil has invited our attention to the decision of the Full Bench of this Court in the case of Bhupatji Shakaraji Vs. State of Gujarat, 2003(2) GLR 1127. By inviting our attention to para 13 of the said decision, the learned APP submitted that the Full Bench has in fact explained the judgment rendered by the Apex Court in the case of K.Mohanan (supra) by observing that the decision rendered by the Larger Bench of the Apex Court in the case of Joseph Fernandez Vs. State of Goa, AIR 2000 SC 3502 will have binding effect. In Joseph's case (supra), the Apex Court negatived the contention that the Authorised Officer should have told the person who was subjected to search that he had a right to be searched. Having carefully gone through the judgment rendered by the Apex Court, it appears that the Full Bench has not considered all the judgments referred to by us and more particularly the judgment rendered by the Constitutional Bench of the Apex Court in the case of

Baldev Singh (supra). In our opinion, when it is the consistent view of the Apex Court in so many judgments referred to above, namely that it is obligatory upon the prosecution to inform the accused of his right to be searched by a Gazetted Officer or an Executive Magistrate which is the mandatory requirement of section 50, the same having not been followed in the instant case, the trial stood vitiated and on this ground alone, the appeal is required to be allowed.

16. In the result, the judgement and order of conviction and sentence dated 31.12.1998 passed by the learned Third Special Judge and Additional Sessions Judge, Dist. Kheda at Nadiad in Special Sessions Case (NDPS) No. 16 of 1997 is quashed and set aside. The accused are ordered to be released forthwith if not required for any other offence.

(K.R. VYAS, J)

(K.M. MEHTA, J)

(pkn)